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Supreme Court of the United States

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, on behalf of themselves and all others similarly situated,

Petitioners,

—v.—

TALISMAN ENERGY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE INTERNATIONAL COMMISSION OF JURISTS AND THE AMERICAN ASSOCIATION FOR THE INTERNATIONAL COMMISSION OF JURISTS, *AMICI CURIAE*, SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici Curiae consist of the International Commission of Jurists (ICJ) and its American section, the American Association for the International Commission of Jurists (AAICJ). The mission of the ICJ, a non-governmental organization based in Geneva, Switzerland, is to promote the understanding and observance of the rule of law and the legal protection of human rights throughout the world. The ICJ is comprised of 60 jurists of high standing in their own country or at the international level. The Commission meets on a biennial basis and elects an Executive Committee of seven members, which, in turn, meets twice a year. The Executive Committee appoints the Secretary General who is responsible for the daily work of the ICJ Secretariat.

Operations are financed in substantial part by a range of governments. The ICJ also receives funding from private foundations, including several American foundations, as well as private individuals. It enjoys consultative status with the United Nations Economic and Social Council, the African Union and the Council of Europe.

The ICJ promotes the rule of law through the work of its Secretariat in Geneva and its 82 sections and affiliates throughout the world. The AAICJ has been composed over the years of senior members of the American Bar as well as distin-

[1] The parties' written consents to the filing of this brief have been filed with the clerk. No counsel for any party has authored this brief in whole or in part, and no person other than amici curiae and their legal counsel made any monetary contribution to its preparation and submission.

guished members of the judiciary and academia. Financially independent from the Secretariat, the AAICJ conducts its own programs according to its own resource base.

SUMMARY OF ARGUMENT

Amicus curiae respectfully submits that the petition for a writ of certiorari filed by the plaintiffs in the present case be granted to allow the honorable Supreme Court to clarify a matter of great relevance for national and international law.

The Second Circuit Court of Appeals in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), erred in finding that customary international law (CIL) requires a *mens rea* of purpose for aiding and abetting liability. The accepted *mens rea* requirement for aiding and abetting liability under customary international law is knowledge, as a thorough review of the findings of the international criminal tribunals for Yugoslavia and Rwanda and the Nuremberg Military Tribunals clearly demonstrates. The decision of the Second Circuit Court substantially draws from Judge Katzmann's concurring opinion in *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), and reproduces the same mistake employing an incorrect approach when determining the content of customary international law; in particular, it failed to recognize that the Rome Statute of the International Criminal Court (ICC) is a treaty that does not necessarily modify prevailing CIL norms. The reasoning of the Court of Appeals, following closely Judge Katzmann's conclusions with regard

to *mens rea*, obscures the fact that the knowledge standard has been consistently applied by international courts construing customary international law and fully satisfies the criteria for liability under the Alien Tort Statute (ATS), 28 U.S.C.A. § 1350, as set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The Second Circuit panel's analysis of customary international law in *Talisman* incorporated Judge Katzmann's errors, leading the panel mistakenly to apply a *mens rea* standard of purpose instead of the correct *mens rea* standard of knowledge.

ARGUMENT

I. THE *MENS REA* FOR ACCOMPLICE LIABILITY UNDER CUSTOMARY INTERNATIONAL LAW IS KNOWLEDGE

The Supreme Court has been asked by plaintiffs to find in the alternative that accessory liability (aiding and abetting) should be based on the standards of international criminal law. If the Court so decides, the Court should find guidance in established international customary criminal law as international courts and tribunals set it.

When determining whether a violation of international law is cognizable under the ATS, courts must ascertain whether the offense violates a norm of customary international law: that is, a "norm of international character accepted by the civilized world and defined with a specificity comparable to . . . 18th-century paradigms" such as "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa v. Alvarez-Machain, supra*, 543 U.S. at 724-25.

Where the United States has not ratified a treaty concerning the norm in question, courts may look to "the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana,* 175 U.S. 677, 700. Courts have held that aiding and abetting a violation of customary international law may lead to individual liability under the ATS, *see, e.g., Khulumani v. Barclay Nat'l Bank Ltd., supra,* 504 F.3d at 260; *Doe I v. Unocal Corp.*, 395 F.3d 932, 946-47 (9th Cir. 2002), and the *Talisman* panel subsequently found that the *actus reus* and *mens rea* for such liability should be determined by reference to international law, rather than to federal common law. *Presbyterian Church of Sudan v. Talisman, supra,* 582 F.3d at 258-59.

Amicus respectfully draws the attention of the sources of international law that should be looked at in determining the constitutive elements of aiding and abetting. In particular, to the fact that under customary international law the standard for the *mens rea* element of aiding and abetting is "knowledge" and not "purpose" as the *Talisman* panel erroneously suggests. This error should be corrected so that the Supreme Court of the United States applies the right law and contributes to the strengthening of the international rule of law.

A. Modern international tribunals uniformly hold that knowledge is the *mens rea* standard for accomplice liability.

The Second Circuit panel in *Talisman* erred as a matter of law in finding that the *mens rea* standard for aiding and abetting liability under customary international law is purpose. A thorough review of the relevant international sources, as the court for the Southern District of New York undertook in *In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009), clearly demonstrates that the correct standard is knowledge.

Judge Katzmann in *Khulumani* was correct in regarding the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) as authoritative interpreters of customary international law. 504 F.3d at 274. The ICTY's mandate, as defined by the UN Security Council, requires the tribunal to apply "rules of international humanitarian law which are beyond any doubt part of customary [international] law." 504 F.3d at 274 (quoting Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 34, U.N. Doc. S/25704 (May 3, 1993)). Both tribunals were created by the United Nations Security Council, and their decisions carry legal authority.

Both the ICTY and ICTR, in construing customary international law, have uniformly required a *mens rea* of knowledge for aiding and abetting liability. The tribunals have unvaryingly applied the knowledge standard in aiding and abetting cases since initially confronting the question in

1997. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 692 (May 7, 1997). *See also Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 545 (Sept. 2, 1998); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 249 (Dec. 10, 1998); *Prosecutor v. Musema*, ICTR-96-13-T, Judgment and Sentence, ¶ 180 (Jan. 27, 2000); *Muvunyi v. Prosecutor*, Case No. ICTR-2000-55A-A, Judgment (Aug. 29, 2008), ¶ 79; *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87-T, Judgment, vol. III, ¶ 281 (Feb. 26, 2009).

In *Tadic*, the ICTY held that "the accused will be found criminally culpable for any conduct where it is determined that he *knowingly* participated in the commission of an offense that violates international humanitarian law," so long as his participation also meets the *actus reus* requirement. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 692 (May 7, 1997) (emphasis added). The Tribunal confirmed this holding shortly thereafter in *Furundzija*, finding that the *mens rea* required for aiding and abetting liability under international law "is the *knowledge* that [one's] acts assist the commission of the offense," and adding that "it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed," so long as "he is *aware* that one of a number of crimes will probably be committed, and one of those crimes is in fact committed." *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 246, 249 (Dec. 10, 1998).

A few months before the ICTY issued the *Furundzija* judgment, the ICTR independently made a similar finding with regard to complicity

in genocide, holding that an accused could be liable "if he *knowingly* aided or abetted . . . one or more persons in the commission of genocide, while *knowing* that such a person or persons were committing genocide, *even though the accused himself did not have the specific intent*" to commit the crime. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 545 (Sept. 2, 1998). The ICTR has since upheld this knowledge standard in *Musema*, finding that the *mens rea* requirement for aiding and abetting liability was fulfilled if the accused "knew or had reason to know" that the principal intended to commit genocide, even if the accused did not share the principal's intent. *Prosecutor v. Musema*, ICTR-96-13-T, Judgment and Sentence, ¶¶ 180-83 (Jan. 27, 2000) (cited in 395 F.3d at 951).

The ICTY and ICTR continue to uphold the knowledge standard in aiding and abetting cases. In the 2009 case *Prosecutor v. Milutinovic*, the ICTY stated with regard to aiding and abetting liability: "As for the required mental element, it must be proved . . . that Milutinovic *knew* that his actions or omissions were providing practical assistance, encouragement, or moral support to the commission of the crimes and that he was *aware* of the physical or intermediary perpetrator's intent to commit crimes." *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87-T, Judgment, vol. III, ¶ 281 (Feb. 26, 2009) (emphasis added). In late 2008, the ICTR made the same finding: "The requisite mental element of aiding and abetting is *knowledge* that the acts performed assist the commission of the specific crime of the principal perpetrator." *Muvunyi v. Prosecutor*, Case No.

ICTR-2000-55A-A, Judgment, ¶ 79 (Aug. 29, 2008) (emphasis added).

In sum, both the ICTY and ICTR, in construing customary international law have uniformly upheld a *mens rea* requirement of knowledge for aiding and abetting liability. This consistency over more than a decade of jurisprudence clearly demonstrates that the universally accepted *mens rea* requirement for aiding and abetting liability under customary international law is knowledge, not purpose.

B. The Nuremberg Tribunals uniformly held that knowledge was the *mens rea* standard for accomplice liability.

The Second Circuit panel in *Talisman* relied on Judge Katzmann's concurring opinion in *Khulumani* in mistakenly interpreting *The Ministries Case* as requiring a *mens rea* of purpose rather than knowledge for accomplice liability, when in fact the Nuremberg Military Tribunals uniformly applied a knowledge standard. 504 F.3d at 276 (citing *United States v. von Weizsaecker (The Ministries Case), in* 14 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* 308, 622 (William S. Hein & Co., Inc. 1997) (1949) (hereinafter "14 *Trials of War Criminals*")). The Second Circuit's decision in *Talisman* then extrapolated from its misinterpretation of this single case to conclude that "international law at the time of the Nuremberg trials recognized aiding and abetting liability only for purposeful conduct." 582 F.3d 259. In fact, the decision in *The Ministries Case* also rests on the standard of knowledge. In its *mens rea* analysis,

the tribunal found that defendant Rasche, a banker, knew that the loans he made would be used to support slave labor:

> The defendant is a banker and businessman of long experience and is possessed of a keen and active mind. Bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used. It is inconceivable to us that the defendant did not possess that knowledge, and we find that he did.

14 *Trials of War Criminals* at 622. The Tribunal then went on to consider whether the act of making such a loan was sufficient to fulfill the *actus reus* requirement, concluding that it was not. *Id.*

Thus, the correct inference to be drawn from *The Ministries Case* is that the Tribunal applied a *mens rea* requirement of knowledge for aiding and abetting liability. The court in *In re South African Apartheid Litigation* adopted this view, stating that the tribunal's finding in *The Ministries Case* "does not deviate" from "the universal knowledge requirement found in international jurisprudence" for aiding and abetting liability. 617 F.Supp.2d at 260. Such an inference is further supported by the tribunal's uniform and explicit use of the knowledge standard in other passages of the Ministries case. For instance, in the case of Puhl, who took part in the sale of stolen property from Holocaust victims, the tribunal explicitly rejected a purpose standard: "the matter (. . .) was probably repugnant" to Puhl but it was sufficient for his convic-

tion that he "knew that (it) was stolen property". *Ministries Case* p. 620-621.

The legacy of the Nuremberg Military Tribunals was adequately affirmed by the UN International Law Commission's Draft Code of crimes against Peace and Security of Mankind, which in Article 2(3)(d) stated: "An individual shall be responsible for a crime . . . if that individual . . . knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime". *ILC Report* 1996, p. 18.

II. THE ROME STATUTE DOES NOT ALTER CUSTOMARY INTERNATIONAL LAW MAKING KNOWLEDGE THE *MENS REA* STANDARD FOR ACCOMPLICE LIABILITY

The Second Circuit court, again relying on Judge Katzmann's concurrence, was mistaken in concluding that the Rome Statute of the International Criminal Court requirement of a *mens rea* of purpose for aiding and abetting liability is reflective of customary international law. The Rome Statute is a treaty that is binding only on those States that ratify it and its standards do not automatically modify or derogate from customary international law. At best, its standards for aiding and abetting are still uncertain since the Court has not yet pronounced itself on the contents of those standards.

A. The Rome Statute is a treaty that does not modify customary international law.

Under international law, custom and conventions are separate sources and their interaction cannot always be seen as one in which one always modifies the other. It is a well settled rule of international law that the conclusion of a treaty does not automatically "deprive [a] customary norm of its separate applicability." *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 94, ¶ 175 (June 27).

Even if Article 25 of the ICC statute, which is ambiguously worded with regard to *mens rea*, is read to support the application of a purpose standard, this standard will constitute *lex specialis* and, under article 10, must not be regarded as "limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, art. 10; *accord* 617 F.Supp.2d at 260-61. To find, as the Second Circuit's decision in *Talisman* did, that the Rome Statute heightens the *mens rea* requirement for aiding and abetting liability under customary international law is to contravene the text of the statute itself.

As the ICJ explained in *Nicaragua*, a treaty on a subject relevant to a norm of customary international law cannot, without more, be understood as codifying, supplanting, or modifying that norm: "[E]ven if a treaty norm and a customary norm . . . were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must neces-

sarily deprive the customary norm of its separate applicability." *Nicar. v. U.S., supra,* ¶ 175. Where a treaty provides specifically that it must not be interpreted as modifying norms of customary international law, as the Rome Statute does, this stricture must be followed. Vienna Convention on the Law of Treaties art, 31(1), May 23, 1969, 1155 U.N.T.S. 331 ("[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"). Therefore, the Second Circuit's decision in Talisman's interpretation of the Rome Statute as requiring a *mens rea* of purpose for aiding and abetting liability, even if correct, has no bearing upon the prevailing *mens rea* requirement of knowledge for aiding and abetting liability under customary international law.

Mere logic and sound understanding of the way sources of international law operate would also lead to the conclusion that the purpose standards in the Rome Statute cannot be regarded as customary international law. If purpose was the standard under customary international law by virtue of the Rome Statute, then all countries should have an obligation to adopt that standard or else violate their international obligations (see Prosecutor brief, Odjanic), which manifestly is not the case.

Inasmuch as the Rome Statute is an international treaty binding only those countries that have ratified it, and the United States of America has not ratified the treaty, the Supreme Court in principle has no obligation to apply the treaty unless it represents customary international law.

B. The practice in countries, including those that have ratified the Rome Statute, does not support the proposition that purpose is the proper *mens rea* standard with respect to accomplice liability.

Under international law of treaties as set forth in Article 31(3) of the Vienna Convention of the Law of Treaties 1969 and now part of customary international law, subsequent practice of countries provides important clues as to the meaning they attach to their obligations under international treaties. *Competence of the I.L.O. with Respect to Agricultural Labour case. P.C.I.J. Reports Series B, No.2,* pp. 39-40 (1922). The practice in countries that are parties to the Rome Statute treaty shows that most of them have adopted standards lower than "purpose" and compatible with the requirement of a knowledge standard for the *mens rea* element of aiding and abetting. This strongly suggests that these countries do *not* regard their obligations under the treaty as imposing an obligation to require "purpose" as the *mens rea* element of the crime of aiding and abetting.

Countries from civil law tradition such as Germany, Switzerland, and the Netherlands, require that the accused be aware of the possibility that his act will assist the main perpetrator and accept this circumstance. Others such as Croatia, Montenegro and Macedonia require intent (including *dolus eventualis*) which is a lower standard than purpose. African jurisdictions influenced by this tradition such as Rwanda, Burrundi and the Democratic Republic of the Congo also require knowledge. Most countries in the former Soviet

Union (e.g. Kazakhstan, Azerbaijan, and the Russian Federation) require indirect intent, which relies partly on awareness of a possibility. Latin American countries generally require *dolus*, including *dolus eventualis*, where knowledge of the possibility that a crime will be committed is part of it. *Prosecution Response to General Ojdanic's amended Appeal Brief (public redacted), The Presecutor v. Sainovic, et al.*, Case No. IT-05-87-A, p. 87-88.

Countries whose legal system is influenced by the common law tradition generally require knowledge for the *mens rea* of aiding and abetting. Such is the case of English law, Australian and South African law. *Ibid.* p. 88-89.

C. The provisions of the Rome Statute with respect to accomplice liability are still uncertain and eventually may well be interpreted to be consistent with the customary international law standard of knowledge as the *mens rea* standard for such liability.

In his concurrence in *Khulumani*, Judge Katzmann himself conceded that the Rome Statute "has yet to be construed by the International Criminal Court" and that "its precise contours and the extent to which it may differ from customary international law thus remain somewhat uncertain." 504 F.3d at 275-76; 582 F.3d at 259.

It has been suggested that the Rome Statute requires a *mens rea* of purpose for accomplice liability in Article 25(3)(c)-(d), which reads as follows:

> In accordance with this Statute, a person shall be criminally responsible and liable

> for punishment for a crime within the jurisdiction of the Court if that person: . . .
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> > (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> >
> > (ii) Be made in the knowledge of the intention of the group to commit the crime. Rome Statute, art. 25(3)(c)-(d); 504 F.3d 275.

At first glance, part (c) may appear to impose a purpose standard for aiding and abetting liability, as Judge Katzmann suggested. However, as the court in *In re South African Apartheid Litigation* observed, it is unclear whether the statute's drafters intended for "purpose" to encompass "purpose as inferred from knowledge of likely consequences." 617 F.Supp.2d at 261 (quoting Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 88 (2008)) See also *Corporate Complicity & Legal Accountability*,

Report of the Panel of Legal Experts, ICJ 2008, p. 22. This possibility gains support from part (d), *supra*, which includes both purpose and knowledge as permissible *mens rea* for joint criminal enterprise liability. It also receives support from article 30 ("Mental element"), which suggests that a *mens rea* of knowledge is sufficient for accomplice liability under the statute. The article reads:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or *is aware that it will occur in the ordinary course of events*. . . . [Emphasis added.]

The court in *In re South African Apartheid Litigation* construed article 30 to mean that "even assuming that '*[f]or the purpose of* facilitating the commission of such crime' in Article 25(c) carries an intent requirement," "intent" as defined in article 30 "does not require that an aider or abettor share the primary actor's purpose. . . . [T]he aider or abettor may be held liable if he or she *is aware* that the assistance provided will substantially assist the commission of crimes in violation of the

law of nations." 617 F.Supp.2d at 262 (emphasis supplied). The ICTY reached the same conclusion in *Furundzija*, suggesting that Article 30 imposes a *mens rea* requirement of knowledge. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment ¶ 244 (Dec. 10, 1998).

The Second Circuit panel in *Talisman* concluded that only the purpose standard (to the exclusion of the knowledge standard) is supported by a sufficient consensus in international law for the purposes of the ATS, 582 F.3d at 258-59. As discussed above, this conclusion is incorrect: sources of customary international law uniformly prescribe a *mens rea* of knowledge for aiding and abetting liability. However, Judge Katzmann stated in his concurrence in *Khulumani* that his research had "revealed no source of international law that recognizes liability for aiding and abetting a violation of international law but would not authorize the imposition of such liability on a party who acts the purpose of facilitating that violation." 504 F.3d at 376-77. This statement formed the underpinning of the Second Circuit's holding in *Talisman* with regard to *mens rea*. 582 F.3d at 258-59. Unfortunately, Judge Katzmann's use of the double negative ("no source of international law that . . . would not authorize the imposition" of aiding and abetting liability where the party acted purposefully) again obscured the fact that although this claim is literally true, *cf.* Model Penal Code § 2.02(5), international legal sources uniformly impose aiding and abetting liability on parties who act with the lesser *mens rea* of knowledge, not only on those who act with purpose.

CONCLUSION

As a careful review of the decisions of international criminal tribunals construing customary international law makes plain, the *mens rea* requirement for aiding and abetting liability under customary international law is knowledge. The decisions of these tribunals have been uniform and unambiguous, demonstrating that the knowledge *mens rea* requirement has "ripened . . . into 'a settled rule of international law' by 'the general assent of civilized nations.' " *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (quoting 175 U.S. at 694). The Rome Statute is *lex specialis* and does not modify this customary international law *mens rea* requirement of knowledge, although the statute may itself be interpreted as adopting (and thereby supporting) the knowledge standard. The Second Circuit panel in *Talisman* thus erred as a matter of law in finding that customary international law requires a *mens rea* of purpose for aiding and abetting liability: the correct *mens rea* requirement is knowledge. The Supreme Court should grant review so that these fundamental errors that affect the application of international law in the United States are corrected.

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